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U. S. Supreme Court.

Josephine W. Wuppermann,

vs.

The S. S. Carib Prince, Ernest Legge,

Claimant.

Petition of Libellant for Writ of Certiorari to the U. S. C. C. of Ap. for 2d Cir.

Please take notice that the within petition will be presented to the U. S. Supreme Court, at the Capitol in the City of Washington, on June 3d, 1895, on the opening of Court.

Yours, &c.,

GEORGE A. BLACK,
Proctor for Libellant.

TO CONVERS & KIRLIN,
Proctors for Claimant.

John Polhemus Printing Co., 121 Fulton St., N. Y.



Supreme Court of the United States.

JOSEPHINE W. WUPPERMANN,
Libellant,

vs.

The Steamship CARIB PRINCE, ERNEST LEGGE,
Claimant.

And now comes Josephine W. Wuppermann by George A. Black, her advocate, and moves this Honorable Court for a **writ of certiorari** directed to the Judges of the United States Circuit Court of Appeals for the Second Circuit, commanding them to certify and return to this Court all the proceedings by them had in the suit in admiralty lately tried before them between said Josephine W. Wuppermann and Ernest Legge, claimant of the steamship Carib Prince.

GEO. A. BLACK,
Advocate for Petitioner,
44 Pine street, N. Y.

To the Supreme Court of the United States.

The petition of Josephine W. Wuppermann respectfully shows as follows:

I. That heretofore she filed her libel in admiralty in the U. S. District Court for the E. D. of N. Y., against the British steamship Carib Prince, to recover for damages to her cargo while laden on said vessel on a voyage from Trinidad to New York, and that Ernest Legge, master of said steamship, appeared as

claimant and answered said libel, and the issues therein were tried by said District Court and the libel dismissed.

II. That petitioner duly appealed to the United States Circuit Court of Appeals, for the Second Circuit, from the decree of said District Court, dissmissing said libel, and said appeal was tried in said Court of Appeals, and on May 28, 1895, the opinion and decision of said Court of Appeals was announced, affirming said decree of said District Court and dismissing said libel, but no mandate thereon has yet been issued.

III. That petitioners cargo was damaged by water which entered the No. 1 lower hold from the forepeak ballast tank of said vessel, through a rivet hole in the collision bulkhead which formed the after side of said tank. The tank was filled at sea in fine weather for the purpose of trimming the ship, and thirty-two hours after it was so filled four feet of water was found in the after end of No. 1 hold, which had escaped from the tank through said rivet hole, in consequence of the clinch of the rivet breaking off on the hold side of said bulkhead. The rivet was out and on examination it was found that the rivet holes did not **fair**, (*i. e.* were not in line or true with each other) which caused the rivet to break. The water which so ran into No. 1 lower hold could not pass off through the bilges provided for that purpose on account of the **limbers**, (*i. e.*, strips of plank laid over the bilges forming the floor of the hold in the line of the bilges), being fitted so tight that no water got through them until holes were bored in them by the ship's carpenter. (Apostles 37, 36). Neither the District nor Circuit Court referred to or passed upon this undisputed defect.

IV. The bill of lading for petitioner's cargo contained the words **"latent defects in hull excepted."**

This bill of lading was issued by the charterers of the vessel. The charter party warranted that the vessel was "*tight, staunch and strong*" (*Apostles*, fol. 438). And it was therein covenanted that the owners should maintain her in a thoroughly efficient state in hull and machinery. (*Apostles*, fol. 440). And that the form of bill of lading used by the charterers should contain the usual negligence clause (*Apostles*, fol. 450), but no other exception was mentioned.

V. That the libellant contended that the Carib Prince was unseaworthy in two respects :

(*a*) by reason of the defects in the rivet holes, which caused the rivet to break.

(*b*) by reason of the defects in the limbers which prevented the water reaching the bilges provided for the purpose of carrying it off.

In support of these contentions petitioner presented the brief to the U. S. Circuit Court of Appeals which, as well as a certified copy of the proceedings in said Court of Appeals and of its opinion, is herewith filed.

The claimant of said steamship contended that the exception of **latent** defects in the bill of lading permitted the unseaworthiness of the vessel without liability therefor, and that this British ship was entitled to the benefits of the Harter Act, and that the owner thereof was excused by that Act for the unseaworthiness of his ship as he claimed to have shown "due diligence" in making her seaworthy.

VI. The Circuit Court of Appeals held among other things as follows :

A. "The defect in the rivet was a latent one which "occurred at the time of the vessels construction

Note.—The vessel was built for the owners under contract and under the supervision of their naval architect James (*Apostles* fol. 250), and their surveyor Lynn (*Ap.*, fol. 212).

"which was not discovered and was not discoverable at that "time,

Note.—The man that put the rivet in the un-*fair* holes knew they were un-fair, and so would the surveyor if he had been attentive and examined them.

"or subsequently, by the exercise of all known and "customary tests and modes of examination."

Note.—The Carib Prince was in the hurricane of Aug. 20, 1893, and was severely strained (*Ap.* 64), had to heave to and use oil (log 57 to 62), and yet the customary tests of filling the tank with water and testing the rivets with a hammer were not adopted before loading the petitioners cargo, See p. 12 of libellants brief in C. C. of Ap.

"which were all employed ;

Note.—The tests above mentioned were employed before the owners accepted the C. P. from her builders, *and then only.* [Apostles 222] and the tank had never been filled after that until the occasion in question [Ap. 67, 68.]

"that it was a *latent* and undiscovered defect in the hull
" of the vessel at the commencement of the voyage from
" Trinidad, *that consequently the vessel was not, at said time,*
" *seaworthy, and* **that the injury occurred solely**
" **through this unseaworthiness** and not by
" reason of filling the tank injudiciously."

B. " The main question in the case is whether the bills of
" lading expressly or clearly limited the implied and ab-
" solute warranty of seaworthiness—which is that the ship
" was in fact seaworthy at the commencement of the voyage
" and is a warranty against latent, unknown and undiscover-
" able defects" * * " *In the case at bar it is urged that*
" **latent** *defects must necessarily mean those existing at*
" *the time of shipment.* * * A defect in order to be latent
" must have been not discoverable at the time of shipment.
" It could not in its nature have been capable of discovery
" then, and have become capable of evading discovery sub-
" sequently." * *

"If latent defects existing upon the voyage are exempted,
" those existing at the time of the shipment are included,
" for they are the same."

Note.—The learned Circuit Judges did not consider the effect of the express warranty of the charter "*tight, staunch and strong*" (Apostles fol. 438), *and gave to the ship* the benefit of the exception of the bill of lading although this was a contract between the charterer and petitioner, but refused the benefit of the charter-clause to petitioner presumably because the charter is a contract between the ship-owner and charterer.

" We concur with the experienced District Judge, that
" the exception 'limits the warranty which the law would
" 'otherwise imply that the ship was seaworthy at the be-
" 'ginning of the voyage and exempts the ship if due dili-
" 'gence is exercised by the owner.' "

Note.—This Court in the Caledonia (157, U. S.) held that a bill of lading which read, "steam boilers and machinery or **defects** therein * * excepted" did not exempt the vessel from

liability for a *latent* defect which made her unseaworthy. Does not "defects" include both latent and patent defects?

Has the Circuit Court of Appeals rightly applied the law of that case to this?

C. "It is insisted by the libellants that the second section of the act of February 13th, 1893 (27 U. S. Stat., 445), commonly known as the Harter Act, *prohibits any clause in a bill of lading which limits the implied warranty of seaworthiness.* The section is as follows:

"Sec. 2. That it shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent, or manager, to insert in any bill of lading or shipping document any covenant or agreement whereby the *obligations* of the owner or owners of said vessel *to exercise* due diligence properly equip, man, provision and outfit said vessel, *and to make said vessel seaworthy* and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents or servants to carefully handle and stow her cargo and to care for and properly deliver the same, *shall in any wise be lessened, weakened or avoided.*"

* * "This section does not bear the construction placed upon it by the libellants which is, *that a* **comma** *shall be inserted* after the word 'diligence,' and that the clause respecting seaworthiness shall be read as a prohibition of any covenant or agreement 'whereby the obligations of 'the owner of said vessel to make said vessel seaworthy, 'etc., shall in any wise be lessened.'"

Note.—The learned judge then considers the effect to be given to *alleged* amendments made to the bill in the Senate [no proof of which was made and as to which the Apostles are absolutely silent] and concluded that while the section as it passed the House permits [and obviously required] this construction, yet the Senate amendments [as the learned judge thought] were inserted with the evident intent to prohibit covenants "whereby the obligation of the owners to exercise due diligence **to** properly equip, man, provision and outfit his vessel and to make her seaworthy should be lessened." It will be observed

that the learned judge, in place of a comma after "*diligence*" has inserted the preposition "*to*" in order to arrive at this construction of the sentence—and he thereby makes the words "due diligence, a qualification of each of the following verbs, "equip, man, provision *and* outfit" which is evidently unnecessary in view of the "*properly*" which already qualified them, and also carries the "due diligence" past the second "*and*" and makes that sentence read "*and due diligence to* "*make said vessel seaworthy.*"

What right has the learned judge to assume that the House of Representatives (which by its original bill forbade the shipowner to throw off his common law liability by any covenant), intended to recede from this position when it accepted an amendment which does not in itself need that interpretation? It may be the Senate thought the amendment relieved the shipowner and that the House did not and therefore was willing to accept the Senate's verbal changes.

There is nothing in § 3 which exacts any other construction; not a line in it excuses from *unseaworthiness* of the vessel, but it permits the discharge of the ship owner from damage "**resulting** from faults or errors in navigation, or in the "management of said vessel," upon the condition expressed, i. e., "if the owner shall exercise due diligence to make said ves- "sel seaworthy."

The requirement of seaworthiness, *implied by law*, in every contract of shipment, and also implied by law in every insurance contract, and a condition precedent to the latter, is based upon *public policy*, and a change in such policy as to the shipowners by implication should not be favored, leaving as it does the shipper still bound to warrant the seaworthiness of the vessel to the insurer. The Eugene Vesta, 28 F. R., 762. This Court in the Caledonia (157 U. S.), quotes from Cohn *vs.* Davidson, 2 Q. B. D., 455, approvingly as follows:

> "As therefore the merchant, in a case like the present, "would not be entitled to recover against his underwriter by "reason of the breach of warranty in sailing in an unsea- "worthy ship, it would follow that if the warranty to be "implied on the part of the ship owner is to be exhausted "by his having the ship seaworthy at an anterior period, "the merchant would lose that complete indemnity by "means of the two contracts taken together which it is the "universal habit and practice of mercantile men to endeavor "to procure.

VII. That petitioner believes that this is the first case in which the Harter Act has received construction from any U. S. Circuit Court of Appeals and that the proper interpretation thereof, especially as to the right of the ship owner by contract, to limit his obligation to provide a seaworthy ship, involving as it does the lives of passengers and crew and affecting liability for the vast values of property entrusted to ships for carriage and the possibility of effecting valid insurance, makes this a proper case for this Court to review said decision.

Wherefore petitioner prays that this Court will grant its writ of *certiorari* to the said U. S. Circuit Court of Appeals for the Second Circuit to send the said cause before this Court, and your petitioner will ever pray, etc.

JOSEPHINE W. WUPPERMANN,
by GEO. A. BLACK,
her Proctor.

Southern District of New York, ss.:

GEORGE A. BLACK, being duly sworn, says, that he is the Proctor for Josephine W. Wuppermann in the cause against the S.S. Carib Prince, mentioned in the above petition and that the matters stated in said petition relating to said cause are true. That the reason why this verification is not made by said petitioner is that she has no personal knowledge of said matters.

GEORGE A. BLACK.

Sworn to before me, this 31st day of May, 1895.

LAWRENCE KNEELAND,
[SEAL.] Notary Public, Kings Co.

Cert. filed in N. Y. Co.

I certify that I have examined the foregoing petition and that in my opinion the same is well founded and one in which the prayer thereof should be granted.

GEORGE A. BLACK,
Advocate.

U. S. Circuit Court of Appeals

FOR THE SECOND DISTRICT.

JOSEPHINE W. WUPPERMANN *vs.* The Steamship CARIB PRINCE.
CLIFFORD L. MIDDLETON, *et al.* *vs.* The same.
MANUEL CADENAS and another *vs.* The same.
WILLIAM GILLESPIE, *et al.* *vs.* The same.

SHIPMAN, *C. J.* These four actions were brought by cargo owners to recover from the British steamship Carib Prince, the damages which a part of her cargo received on a voyage from Grenada to New York which commenced about August 31, 1893. The bills of lading, which were signed in Trinidad, a port governed by English law, excepted the ship from liability for injuries arising from "latent defects in hull, tackle, boilers and machinery."

The vessel was a new steel steamer of 2,500 tons dead weight capacity, built in the spring of 1893 at Sunderland, England, by experienced builders. She was "constructed with a water tank

of iron in her peak, one side of which was formed by a bulkhead. The tank, when she sailed from Grenada, was empty, but during the voyage from Grenada to New York it was filled with water one afternoon, in order to trim the vessel," and the next morning, or the morning after, the tank was found partiall empty, and investigation showed that the head had come off from one of the rivets riveting the side of the bulkhead next to the hold, and leaving a hole through which water had poured upon the libellants' merchandise stowed near the bulkhead. The rivet was the end rivet in a series which attached a transverse "knee tie" to the bulkhead on the inside of the tank.

The testimony clearly showed that abundant diligence was used in the construction of the vessel, that the defect in the rivet was a latent one which occurred at the time of the vessel's construction, which was not discovered and was not discoverable at that time, or subsequently, by the exercise of all the known and customary tests and methods of examination, which were all employed ; that it was a latent and undiscovered defect in the hull of the vessel at the commencement of the voyage from Trinidad, that, consequently, the vessel was not, at said time, seaworthy, and that the injury occurred solely through this unseaworthiness and not by reason of filling the tank injudiciously.

The main question in the case is whether the bills of lading expressly or clearly limited the implied and absolute warranty of seaworthiness, which is that the ship was in fact seaworthy at the commencement of the voyage, and is a warranty against latent, unknown and not discoverable defects. (The Edwin I. Morrison, 153 U. S. 199. The Caledonia, 156 U. S. The Glenfruin, 10 Prob., Div. 103.) The recent case of the Caledonia, *supra*, declared that exemptions in bills of lading which limit the extent of this implied warranty, must be expressed in clear terms, or they will be construed strongly against the ship-owner, and consequently held that an exemption which excluded loss or damage from defects in steam boilers and machinery, did not mean defects existing at the commencement of the voyage, and thereupon did not protect the owner from liability for unseaworthiness.

The bills of lading in these cases exclude losses arising from latent defects in the hull, and the question is whether this language does not necessarily mean defects existing at the time of shipment, and therefore whether it does not clearly

and even expressly exclude unseaworthiness arising from such defects.

The only case in which the effect of an exemption of "latent defects" is discussed is "The Laertes, 12 Prob., Div. 187," but in that case the language of the bill of lading was "latent defects * * even existing at time of shipment," so that the intention of the parties to limit the implied warranty was manifest. In the cases at bar, it is urged that latent defects must necessarily mean those existing at the time of shipment, and that any other construction is exceedingly strained. A defect in order to be latent must have been not discoverable at the time of the shipment. It could not in its nature have been capable of discovery then and have become capable of evading discovery subsequently. A construction which should say that latent defects meant those only which had become latent since the vessel left the wharf, and could not mean previously existing defects, savors of the distinctions of the schoolmen, and if latent defects existing upon the voyage are exempted, those existing at the time of the shipment are included, for they are the same.

We concur with the experienced district judge, that the exception "limits the warranty which the law would otherwise imply, that the ship was seaworthy at the beginning of the voyage, and exempts the ship if due diligence is exercised by the owner."

It is insisted by the libellants that the second section of the act of February 13, 1893 (27 U. S. Stat. 445), commonly known as the Harter Act, prohibits any clause in a bill of lading which limits the implied warranty of seaworthiness. The section is as follows:

"Sec. 2. That it shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent, or manager, to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel to exercise due diligence properly equip, man, provision and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents or servants to carefully handle and stow her cargo and to care for and properly deliver the same, shall in any wise be lessened, weakened, or avoided."

Waiving the question whether this section applies to a foreign contract entered into by owners who are foreigners, the section does not bear the construction placed upon it by the libellants, which is that a comma shall be inserted after the word "diligence," and that the clause respecting seaworthiness shall be read as a prohibition of any covenant or agreement "whereby the obligations of the owner of said vessel to make said vessel seaworthy, &c., shall in any wise be lessened." The language of the section, as passed by the House of Representatives, permits this construction, but in the Senate the words "exercise due diligence" were inserted prior to the words "properly equip," and the evident intent of the section as amended and the effect of the amendment, was to prohibit covenants whereby the obligation of the owners to exercise due diligence *to* properly equip, man, provision and outfit his vessel and to make her seaworthy should be lessened. A like amendment was inserted in the third section, which provided that if the owner exercised due diligence to make the vessel seaworthy, he should not be responsible for damage resulting from subsequent faults in navigation. These amendments indicate the intent which ran through the act as it left the Senate, and make it plain that one design of the act as amended was to permit the owner to relieve himself from the rigidity of the warranty of seaworthiness but not to permit him to lessen his obligation to exercise due diligence in all respects at the inception of the voyage.

The claimant endeavored to show that the cause of the injury was an error of the master in filling the tank at sea, and that therefore the owner was protected by the third section of the Harter Act, but as the injury did not arise from an error in the management of the vessel, an examination of this section is unnecessary.

The decrees of the District Court are affirmed with costs.

GEORGE A. BLACK,
For the Libellants.

J. PARKER KIRLIN,
For the Respondents.

(Endorsed) United States Circuit Court of Appeals, for the Second Circuit.—Josephine W. Wupperman *v.* The Steamship Carib Prince.—Clifford L. Middleton, *et al.*, *v.* Same.—Manuel Cardenas, *et al.*, *v.* Same.—William Gillespie, *et al.*, *v.* Same.—Opinion, Shipman, C J.—United States Circuit Court of Appeals, Second Circuit, filed May 28, 1895, James C. Reed, Clerk.

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1944
Brief of Black for Appt.

U. S. Circuit Court of Appeals

FOR THE SECOND CIRCUIT.

Filed June 3, 1895.

Josephine W. Wupperman,

Libellant and Appellant,

vs.

The S. S. Carib Prince, Ernest Legge,

Claimant and Appellee.

And Three Other Cases.

Brief for Libellants.

The Harter Act Reviewed.

GEORGE A. BLACK,

Advocate.

John Polhemus Printing Co., 121 Fulton St., N. Y.

U. S. Circuit Court of Appeals

FOR THE SECOND CIRCUIT.

JOSEPHINE W. WUPPERMAN,
Libellant and Appellant,

vs.

The S.S. CARIB PRINCE, ERNEST LEGGE,
Claimant and Appellee.

And Three Other Cases.

Brief for Libellants.

These four appeals are from the decrees of the U. S. D. C. for the E. D. of N. Y., dismissing the four libels for damage to cargo shipped on the S.S. Carib Prince.

The four libellants are: 1, Josephine W. Wupperman, Libel, p. 2; 2, Cadenas & Co., Libel, p. 175; 3, Middleton & Co., Libel, p. 190; 4, Gillespie Brothers & Co., Libel, p. 200.

The Carib Prince.

While in course of construction, this vessel was chartered to George Christall to run in the Trinidad Line, by a time charter, dated Sept. 14, 1892 (437), in which the owners warranted the steamer *tight, staunch and strong*, and every way fitted for the service (438). By the charter the owners are to appoint three engineers, and the charterer the rest of the officers and crew, including the captain (439).

The charter also provides that the owners shall maintain the

steamer in a thoroughly efficient state in hull and machinery (440), and (Art. 18) that bills of lading used by the charterers should contain the usual negligence clause (450).

There are no other exceptions in the charter.

The vessel was built at Sunderland, England, and was constructed with a water ballast tank in her fore peak, the collision bulkhead being the after end of the tank and the forward end of hold No. 1. The cargo was damaged by a leak through a rivet hole in this bulkhead on the voyage from Trinidad to New York, in September, 1893.

The Construction of the Tank.

The collision bulkhead or after end of the tank extended from side to side of the ship, a distance of about 38 feet (105). In order to strengthen this bulkhead, it was fastened on its forward face by what is indifferently called a knee-tie, gusset or angle (which was a triangular plate of iron) to the stringers on each side of the vessel, which ran horizontally from the bulkhead to the bow, along the side of the ship (Saunders, 421), and to this gusset or knee-tie was fastened a *single* angle-iron by rivets, which angle-iron in its turn was fastened by rivets to the bulkhead (Engineer Keeys, 118; Capt. Legge, 26; Martin, 269). See model (375, 376).

The vessel sailed from Trinidad on August 31st, with libellants' cargo stowed in her No. 1 lower hold, stopped at Granada, just north of Trinidad (28), but took in no cargo, and then proceeded on her voyage to New York.

She drew fourteen feet two inches forward and sixteen feet ten inches aft on leaving port (Capt. Legge, 41), being two feet by the stern. On September 3d, Capt. Legge, deeming it absolutely necessary to change her trim and bring her more by the head, ordered this tank filled with water (40). This was done by ten o'clock that evening (Ship's Log, p. 162, Legge, fol. 80; Scott, 304). The weather was fine (304), and the ship was not stopped (305).

At six o'clock on the morning of the 5th of September it was discovered that this tank, which held 83 tons of water (22, 106), was partly empty. This discovery was made by the ship's carpenter sounding in the tank (First Officer Scott, 282), and the entry, under date of September 5th, in the engineer's

log corroborates this (page 164). Capt. Legge, at folio 32, says the discovery was made the next morning, *i. e.*, on the 4th of September (47), but he corrects this when he looked at his log at folio 80, and says that the tank had been filled for a period of 32 hours.

The Discovery of the Leak.

Carpenter Hopkins (321) says he sounded the different holds morning and evening (321)—that the sounding well of No. 1 is at the after end, close against the bulkhead (330)—that the sounding rod goes down to the bottom of the limbers (323)—that the tank was filled Sunday night and *he thinks* the leak was found on Monday morning.

This is an error as the log shows and as Capt. Legge says (80) and Eng. Keeys also says it was filled on the night of Sept. 3 and emptied on the morning of Sept. 5 (107).

Hopkins says (325): "I sounded the tank and found a defi-"ciency in the tank and *then* I went to the limbers and found "there was water in it." He then informed Mate Scott, who says (282): "The carpenter after sounding the ship at 6 A.M. "came and reported to me that the tank was slack or leaking."

Eng. Keeys says (108) the water in No. 1 hold was discovered "by the decrease of water in the tank"—discovered by the carpenter—by sounding the tank. He also says no soundings to his knowledge had been taken in the tank before this (109).

Keeys says (109) he went down into No. 1 hold and found Mate Scott there (110) and Scott says (285) that Keeys was there with him. They found from 3 to 4 feet of water at the after end of the No. 1 hold (283, 113) and about 8 inches at the forward part (283).

Eng. Keeys says (114) that they formed an idea where the leak was from hearing the water gurgling, and moved the cargo and "there was a bore of water coming; the hole was full of "water; it was spurting out with considerable force and (111) "rushing out of the bulkhead against the cargo."

Capt. Legge says (73) he "heard the sound of water coming through the hole" and (49) found the hole the second tier down below the top of the cargo; that the water was squirting out through the rivet hole (51), but part of the rivet was in (37).

The Broken Rivet.

There is a difference between the witnesses as to whether there were one or two rivet heads picked up—and one or two rivet holes which were plugged.

Capt. Legge says (37): "We found water leaking through "a rivet hole * * part of the rivet was in it, the head was "off of it * * (38) found one rivet in that condition * * "(38) I ordered the carpenter to punch it out and put a plug "in to stop the leak * * (48) this broken rivet was on the "port side * * two feet or eighteen inches from the side of "the ship * * (69) about four feet above the floor * * in "a horizontal joint" * * (71) these rivets were 3½" or 4" from center to center and six or eight in the plate—"only one "was broken" * * (74) a chain locker covers 6 or 8 feet of the face of this bulkhead in the middle of it, and * * (75) the broken rivet was 3 or 4 feet from the (port) side of the chain locker. * * (75) He did not remove the cargo on the starboard side of the chain locker so as to examine that side of the bulkhead. He did not see the rivet head picked up (49) but says (48) the carpenter picked it up and passed it to Mate Scott. * * (77) He was not present when the tank was tested in England, and it had never been filled after that test till Sept. 3 (65, 68).

Eng. Keeys says (116) the broken rivet "was about 3 or 4 "feet from the bottom of the tank, *i. e.*, 3 or 4 feet above the "floor of No. 1 hold, and 18 inches to 2 feet from the ship side" * * * (117) There were about 6 other rivets in that same locality; they were 3 to 4 inches apart horizontally and 2 feet vertically from any other seam of rivets * * . (118) That was the only rivet found defective *at that time* * * . (124) The Chief Officer (Scott) took that rivet head. "I saw it picked up; it was found on a bag right under the hole."

The rivet head was produced by Eng. Keeys and marked for identification Ex. 6 (125).

All the rivet holes on that knee-tie were countersunk on the hold side of the bulkhead, and this broken piece indicated it had broken in the countersink (125).

The broken rivet was driven back and a wooden plug put in (115).

The broken rivet was at the extreme end of the knee-tie or gusset (called here the angle-iron), the right angle of which lay at the junction of the stringer which runs fore and aft, one on each side, with the bulkhead so that the broken rivet was towards the centre of the ship (139). Keeys was present at the survey in New York and says (140) there was *another* rivet found gone "next to the one that was gone."

Surveyor Clark (350) examined the C. P. on Sept. 15 and found two rivets out and nine weeping; the holes were plugged with *two pine plugs*, one on the starboard and one on the port side at the angle-iron, in the same horizontal plane, about five feet above the floor, and the port one two and a half feet from the side of the ship, and the (352) starboard one three or four feet from the side * * . (354) Chief Engineer Keeys pulled out the plug * * (352) on the port side. This rivet went through the lap (359) of the bulkhead plates and the angle-iron, *i. e.* (360), through two thicknesses of plates and the angle-iron.

Surveyor Martin (claimant's witness, 268) visited the C. P. on Sept. 11th and 12th. He says (269) he "found one rivet on the "port side at the inner end, that is, towards the centre of the "ship, of the angle-iron connecting the side stringer with the "bulkhead, the head was gone, one rivet next to that was "loose." * * There was no part of the broken rivet in the hole; there was a plug there; *a wooden plug* in the hole. *He* did not remove the plug (270, 271). He also found (271) on the starboard side, corresponding angle, two rivets also leaking, and he counted 11 rivets in bulkhead that were leaking

Surveyor Congdon (claimant's witness) saw (150) the rivets that had been started; *one* was gone * * (158) *i. e.*, partly gone, *part of the iron was still in the hole.* No wooden plugs in * * (164) it was too short to hold a plug * * (151) the after-end was out, the remaining end was in the hole * * a *bolt* was put in there, as temporary repairs. He didn't see the rivet taken out (150) * * (397) and only saw that one.

Surveyor Martin (409), recalled by claimant, said he thought Congdon in error as to the place the rivet head was gone, that he saw the same one, *but not in the place* Mr. C. saw it.

Mate Scott (claimant's witness) says (284) a rivet was out in the tank on the port side * * (285) he could see the water rushing and *drove a plug in* * * (297) there were *two* rivet heads, "*I picked up one and Chief Engineer Keeys picked up the* " *other one* * * (312) The way the water was rushing out I should " say the hole was quite open" * * (314) had two rivet heads in sight. * * Didn't search to find out where other rivet head came from; * * (315) had it fixed in his mind that the rivet head he had came from that hole * * (314) He kept one. Afterwards he doubted whether there was more than one rivet head found (317).

The Rivet Hole was not Fair.

Eng. Keeys examined the rivet head (Ex. 6, produced by him) (125) and (142) declared it was *inferior iron** without fibre, short and brittle, and (144) it was rusted up so you cannot see the fibre, but (145) he could see that it "had been headed " up *one-sided*, that is, the top had not spread evenly over the " portion which had been countersunk" and * * (147) "that " (rivet) would indicate that one end of the rivet had been up " and one *down*."

" Q. *Does that mean that the holes had not been bored true?*"

" A. *That is the exact meaning of it*" (147).

" Q. Did you put the plugs in these holes?"
" A. I was there when *it* was put in."
" Q. Did you see the holes?"
" A. Yes, sir."
" Q. *Did the holes come true?*"
" A. **The holes did not come true; they cut them out so they would come true.**"
" Q. Who did?"
" A. The boilermakers.
" Q. When?"
" A. When the repairs were made."

Surveyor Clark says (350) that he examined the Carib Prince

* Mate Scott said it was fair iron (307). It was mislaid and could not be found at the trial in the District Court.

on Sept. 15th * * (354) that the chief engineer pulled the plug out of * * (352) the rivet hole on the port side * * "*The iron wasn't fair between the two plates*" * * (355) and that he put his finger in the hole * * that the iron on the inside plate was battered * * (353) the hole showed smaller on the inside than it did on the outside * * it didn't appear to be *fair* in the hole between the two plates * * it was out about an eighth of an inch * * (354) it was rounded on the edge of the inner plate * * (358) when I put my finger in, one was little more off on the starboard, the other on the port, inside * *

(356) "Q. How could you tell the extent to which it didn't "fair accurately?"

"A. By my eye."

Saunders [claimant's superintendent] (251) * * (252) did not see the C. P. till January * * (253) *after the temporary bolt had been put in* * * (261) he was not present when the bolt was removed * * * * (259) that bolt ran through the inside end of the angle-iron on the fore and aft stringer on the port side * * (260) he did not have the bolt in his hand * * (261) when he saw it next "the hole was clean; there was nothing in it" * * (262), and he put his finger in the hole and found it fair. * * (263) he did not measure the hole * * (261) the bolt was head side in the tank and nut side in hold No. 1.

Who made the temporary repairs is not shown.

McGowan, foreman of John N. Robbins (379), went *once* to the C. P. and (390) didn't see any plug * * (391), nor bolt, and * * (393) made no particular inspection of the hole where the rivet was missing * * (396) one rivet was out while he was there (but it could not be the plugged one, for) * * (386) the countersink was off, nothing but the head hanging on, and * * (381) that was on the starboard side. * * (389) on the athwart ship bar * * (394), not on the extreme end of the gusset plate.

* * (385) He went alone * * once * *; didn't have his time book in court, and couldn't fix the date; (389) he didn't go inside the tank. * * (391).

The men who made the repairs were not produced.

The Rivet Hole was Bad and Weakened the Rivet.

It was shown by Eng. Keeys (147) that the holes in the plate and angle-iron had not been punched true, and (148) had to be cut out when the boilermakers made the repairs, and it was shown by the rivet-head itself (145) that it was headed up one sided, and by Inspector Clark that the hole, both to the eye (356) and touch (355), showed that the plates did not fair (352) and had been battered (355) * * (353) and the holes were out of line about one-eighth of an inch.

Expert Quinn testified (371) that putting the rivet in a hole $\frac{1}{16}$ to $\frac{1}{8}$ of an inch out of line weakened the strength of the rivet one-third; that 6,000 pounds would be the normal strength of a $\frac{3}{4}$ rivet, and says (370): "If a rivet is driven in at an angle, it "has not the same strength as a rivet driven through a fair "hole."

Note.—There is no contradiction of Quinn.

Claimant's witnesses (examined under the English Commission)—who were Short, the builder (169), Wooland, the foreman riveter (185), Sharp, Lloyd's surveyor (219), James, the naval architect (235) and Lynn, his inspector (204) all concur in saying that if the holes do not fair they should be *rimed* out. Short, 180, Wooland, 198, Sharp, 230, James, 246, Lynn, 215.

They also all concur in saying that the *drift-iron* was used on this tank bulkhead. Short, 176, Wooland, 193, Sharp, 226, James, 242, Lynn, 210.

The drift-pin is described by Quinn (339), and its use is to *upset* the holes when they are not fair so as to get the rivet in *at some angle.*

Quinn described (364) the effect of not fairing of the rivet holes: that in *pinning* (*i. e.*, with drift-pins) the gusset plate (knee-tie) to the side of the ship and rivetting the bulkhead by the angle iron to the gusset plate would put a strain on either the bulkhead or ship's side.

A model was put in evidence showing the form of putting together (375, 376) which Martin said was correct (276).

Martin (claimant's witness) said (277) that two angle-irons, one on each side of the knee-tie, are more common.

The Quality of Iron of the Rivet.

James, the architect, produced (250) an extract from the specifications, Ex. A (463), and this showed (466) the rivets were "to be of iron of *good* quality, to owners' approval."

No evidence of any test or examination of the rivets or of their quality was given.

Short, the builder, testified (171) these rivets were procured from Tyzack & Co. and that rivets from that firm "*are usually* "*tested by bending them when cold and flattening them*" * * (172) "I do not remember testing any particular rivets in that "bulkhead."

No careful watch was kept on the riveting as it proceeded. Short (171, 175) exercised a *general* supervision but did not see any of the rivets inserted in the rivet holes in the fore tank (179).

Wooland, the foreman (192) was constantly going backwards and forwards *superintending* **all** *the work* and * * (198) cannot say how many rivet holes in that fore tank he saw faired; those that required to be rimed would be rimed, but cannot exactly say the number * * (199). "The holes that "were not properly in line had to be faired. I found when the "bulkhead is complete, *there were very few rimed holes.* If "a hole is rimed we put a bigger sized rivet into it * * (200), "I gave a *general, usual and careful supervision* to the rivet-"ing of the fore tank. *I was there as often as I could possibly* "*get*" * * (186) The workmen were first-class men * * "we always employ the same set of men for water-tight work. "*It is important in this work* that we should get the best skill "we can."

> *Note.*—It is obvious that a large body of water in the *inside* of this ship was a constant peril to the cargo, and the need of extreme precautions was measured by the danger. Yet the rivet head produced showed that careless work had been done which escaped detection.

Claimant's counsel attempted to raise *a theory* of crystalliz-

ation of the iron of the rivet by too much hammering and Eng. Keeys was his only witness in support of this theory (143). He said the condition of the fibre of the iron *might* be produced by too much hammering. Builder Short (179), foreman Wooland (195), Surveyor Sharp (228), Architect James (244) and Surveyor Lynn (212) all say that these *three-quarter rivets were all headed hot—that it is impossible with that size to head them cold, and that there is no danger of too much hammering.*

Wooland (195) says: "In water-tight work it is never done cold * * with a rivet of that size it would be practically *impossible* to knock it down cold" and (201) "I never saw a "heated rivet hammered too much. *The thing* is to get them "to hammer it sufficiently. We have to watch them to see "that they hammer it properly."

Quinn says (343) that if driven too cold and it crystallized it would break *in the centre* "and both pieces remain in the holes."

In this case the clinch or head came off at the countersink on the hold side of the collision bulkhead.

Filling the Ballast Tank at Sea.

In order to get under cover of the Harter Act, the claimant alleges in his answers (13, 513, 554, 587) that the damage was due to "some error or fault in the management or navigation of "the vessel in filling the said peak tank on the voyage."

In support of this defense claimant did not ask one word about what happened at the filling of the tank of either Capt. Legge or Engineer Keeys (who were both examined as libellants' witnesses before answers were filed, but Capt. Legge recalled long after).

Capt. Legge said (66) there had been no rough weather from the time of leaving up to discovering the water in the hold.

Mate Scott says (304): "Q. What was the condition of the "weather and wind during that time (*i. e.* while filling tank)? "A. Fine weather. * *. (305) The ship was not stopped; "it took five or six hours to fill it" and (305) repeats it was "Fine weather."

Scott was not asked anything as to the propriety of filling the tank in that kind of weather, and obviously the claimant's

counsel didn't want what those on the ship could tell, and preferred to leave the matter in the realm of conjecture.

It must be remembered that this bulkhead was the *collision* bulkhead, intended to protect the hold from the very danger of water filling this fore peak, and worthless if not secure enough to stand the pressure of water in it.

By the specification, Ex. A, (467) it was to be "*additionally strengthened to owners' satisfaction*," but no evidence exists that it was.

Saunders, the claimant's superintendent (251), starts off the game by saying (258) it was *not prudent* to fill the tank at sea without stopping; at 415 he speaks of Capt. Legge as having a first class certificate as master mariner, and claimant's counsel, desiring to maintain Capt. Legge as a *competent* master, makes Saunders say: "Q. Your criticism of him relates solely to the "filling of the tank on this particular occasion? A. Yes."

Martin (engineer and surveyor) also said (271) it was not prudent to fill the tank without stopping.

Congdon (recalled) (397) also declared it was very unwise to fill the tank at sea, but (404) limited his opinion by adding that if the water is perfectly smooth it wouldn't hurt.

The vessel was, by Capt. Legge's confession, not in proper trim, when she left Grenada only three days before, and was, therefore, unseaworthy in this respect, or unseaworthy by reason of her captain being incompetent.

No evidence was given as to the sufficiency of the bulkhead to stand the expected strains, but Quinn (365) enumerated the various causes why the rivet head would break, viz.: (1) badly fitted gusset plate; (2) holes not punched fair; (3, fol. 368) insufficient bracing in centre of bulkhead; (4) crystallization of rivet or hammering on it while cold; (5, fol. 369) inferior iron; (6) extra pressure on a full tank.

Of the above causes but *one sufficient* one was proved, viz. the rivet holes were not fair, as was shown by Engineer Keeys (147 to 149) and Inspector Clark (352 to 359).

No one disputes their evidence. The rivet Congdon saw broken was only partly gone, and was on the vertical bar (163). Martin did not have the wooden plug withdrawn (270) nor ex-

amine the hole (271), and saw a different rivet from Congdon's (410). Saunders did not see the Carib Prince till January (252), and then the bolt, with nut on hold side and head on tank side, was in place (260 to 262) and had been got in as Keeys says *by cutting the holes true* (148).

This broken rivet was at the extreme inner end of the gusset or knee-tie (Martin 269) on the port side and would take the greatest strain from the use of drift pins; the rivets nearer the side of the ship feeling less pull, as they would be nearer the point of least motion. The weakest part would be the first to go, and then the rest of the rivets would take, not only their own prior share of the general strain, but the added amount due to reducing the effective number.

In other words, if five men are holding a certain weight or resisting a certain tension, and one gives out, the burden of the other four is increased, and if the five were just equal to the burden, the loss of one means the breakdown of all.

The surplus of strength is the factor of safety, and the closer the strain is to the endurance the less the factor becomes.

The August Hurricane.

In order to account for the broken rivet, claimants have presented several different theories and among others they have asked the Court to believe that the vessel was severely strained in the hurricane of August 20th, 1893, and Capt. Legge says (64) that in the ten years of his trading in the West Indies he never saw a worse one. The log entries of both mate (57 to 62) and engineer (127) were offered and show terrific seas and use of oil, vessel hove to (58 to 61) and great straining of vessel.

Of course this strain on the vessel ought to have been the occasion of a most solicitous examination and inquiry, made with all known tests—*one of which and a very simple one would have been to fill this fore peak tank* and use the hammer test on the rivets. *But nothing of the kind was done.*

Capt. Legge says (67) he never was inside the tank—and that (67, 78) it was never filled from the time it was tested by the builders until Sept. 3.

Eng. Keeys says (129) that on August 22 (134), after the hurricane he went down into the tank * * (130) "*not for a*

"*practical examination*," * * just to satisfy myself—to "have a look at the formation of the tank principally. It "was the first time I had seen it; * * (134) the vessel was "then at sea" * * he went alone; * * (135) he found no *appearance* of any starting of the cement * * (142) and confined his examination entirely to the tank side and did not go into No. 1 hold, even after the cargo had been delivered (132).

Capt. Legge says (65, 78) the only examination, after the hurricane, of this tank bulkhead was that of Eng. Keeys and that he made no report about it to him.

Mate Scott says (296) no particular examination was made (294). The hammer test was made on the inspection in England. Sharp (222) Wooland (187) Short (173) James (237).

Why the Cargo was Damaged.

That four feet of water (283, 113, 331) was found in No. 1 hold—which got there through a rivet hole three quarters of an inch in diameter (51) in which the broken rivet remained (37)—shows that this small stream had been pouring in for many hours—and confirms (if confirmation were needed) the log and Capt. Legge and Eng. Keeys, who say the tank was filled on Sept. 3d at 10 P. M. and the leak discovered on Sept. 5 at 6 A. M., a period of 32 hours (80, 107).

The Tight Limbers.

The reason it accumulated to such an extent, and was not discovered when the wells were sounded, was that the floor of this hold was caulked (Legge, 29, 30, 43) and *the limbers on top of the bilges were fitted so tight that no water passed into the bilges.*

Capt. Legge says (34) he had the cargo moved from the sides of the ship so as to get at the limber boards "*so as to allow the* "*water to get into the bilges* and be pumped out through the "engines" and * * (36) after moving the cargo "*we bored* "*holes to let the water go through*" and (37) "Q. Until you "bored these holes the water stayed there? A. Yes, sir."

Note.—The sounding well for this hold was close to the after bulkhead (329, 330), and if the water could have got

through the limbers, it would have shown in the bilges, which, however, did not show any (291) when the holds were sounded night and morning on Sept. 4 (289), as only an inch or two (325) was found, which is the usual quantity, and couldn't be pumped closer (337, 291). Capt. Legge says (36, 43) the sluices between the bilges and engine room are always kept open. Eng. Keeys was not asked, although he would certainly have known. Mate Scott denied it (288).

Carpenter Hopkins says (331) that the water in this hold was up to his knee when standing on the dunnage * * (332) he bored five three-quarter inch holes through the limbers on each side of the ship, all *at the after end* close together.

Mate Scott says (286) he shifted the cargo in the wings and *got the* limber boards up in the after end. "Q. Did you get "them up? A. No; we couldn't get the back one up, *but we* "*cut through* to let the water run down to the strum boxes" (*i. e.*, the strainer in the bilge, 286).

Capt. Legge says (45) that the limbers were not raised at all, and (46) when they got to New York they came out "*hard;* "*had to pry them open with a bar.*"

Surveyor Congdon says (407) the limbers are boards covering the water course and should always be made so as to lift out, and he had seen thousands and had never seen them so tight that they would not lift out—that (406) the purpose of the bilges is to make a water course in the ship, to keep the holds dry and the cargo from being damaged by an accumulation of water.

Capt. Legge says (25) the bilges in No. 1 hold would be 18 inches wide * * (24) that there is a tank runs the entire length of the vessel, divided by the bulkheads, the sides of the tank and the sides of the ship making the bilges, which are triangular spaces * * (41) two feet deep in No. 1 hold aft and 15 to 18 inches forward.

It is obvious this bilge space would contain a large body of water which ought to have run through the sluices and shown in the well when sounded, but that it did neither is certain *and proves how absolutely useless the bilges were made by the tight limbers.*

The Defences.

The bill of lading contains exceptions not mentioned in the charter party, among others, "*latent defects in hull*" (430), and the preliminary question, *when the vessel is sued*, is, can she avoid the express warranty of being tight, staunch and strong, contained in her charter (438), by claiming the benefit of this bill of lading clause, when the charter (Art. 18, 450) limits the clauses the charterer is to put in the bill of lading to the "*usual negligence clause.*"

Evidently the shipper is entitled to the benefit of the warranty of the charter.

N. J. St. Nav, Co. *vs.* **Mech. Bk.,** 6 How., 378. In that case the expressman had a contract with the ship-owner, and the court held the owner of the property shipped could maintain an action *in admirally* on that contract, or have the benefit of it.

The Latent Defect Clause.

But if the ship owner can avail himself of the "latent defect" clause of the bill of lading, it does not operate to limit the warranty of seaworthiness.

The question is settled by the construction given in the **Caledonia**, 50 F. R., 567, by the Circuit Court, 43 F. R., 685, and by the U. S. Supreme Court to almost identical words.

Gray, *J.:* "In the case at bar the unseaworthiness of the "vessel consisted in the unfitness of her shaft when she left "port, and that unseaworthiness was the cause of the damage "to libellant's cattle. The exception of 'steam boilers and "machinery or *defects*' therein, inserted in an instrument "framed by the ship owners and in the midst of a long enumera-"tion of various causes of damage, all the rest of which relate "to matters happening *after the beginning of the voyage*, must, "by elementary rules of construction and according to the "great weight of authority, be held to be equally limited in its "scope *and not to affect the warranty of seaworthiness at the "time of leaving port upon her voyage.*"

In affirming this case on March 11, 1895, the U. S. Supreme Court, speaking by Fuller, *J.*, said:

"As is well said by counsel for appellee, the exceptions in a "contract of carriage limit the liability, *but not the duty*, of the "owner, and do not, in the *absence* of an *express* provision, pro- "tect the shipowner against the consequences of furnishing an "unseaworthy vessel. *If the exceptions are capable of, they "ought to receive*, to use the language of Lord Selborne in "Steele *vs.* S. S. Co. (3 Ap. C., 72), '*a construction not nulli-* "'*fying and destroying the implied obligation of the ship-* "'*owner to provide a ship proper for the performance of the* "'*duty which he has undertaken.*' There was no exception in "this bill of lading which *in express words* exempted the ship- "owner from furnishing a seaworthy vessel at the commence- "ment of the voyage. As the exceptions were introduced by the "shipowners themselves, in their own favor, they are to be con- "strued most strongly against them, *and we perceive no reason "why the obligation to furnish a seaworthy vessel should be "held to have been contracted away by implication.*

"*Their meaning ought not to be extended to give the ship- "owner a protection, which, if intended,* **should have "been expressed in clear terms.**"

The above language of Judge Fuller may be re-enforced by that of Lord Penzance in **The Quebec Ins. Co.** *vs.* **Bank,** L. R. 3, P. C. 242, where he said: "It is said that the language of "the policy is such, that the Court ought not to imply there- "from the ordinary warranty of seaworthiness. No doubt it is "competent to parties by language in a contract to which, as "an ordinary rule, the law applies some implied condition, *by "express, pertinent and apposite language* to exclude that "condition, and the question in this case is, whether the parties "have done so? This, like all questions of contracts, is a "question of the intention of the parties. The law by which "the warranty of seaworthiness is attached to the contract is a "law known to the parties who make contracts of this descrip- "tion, and therefore they are prepared to understand that the "implied warranty will be attached to the contract they are "about to make. *If, therefore, there is an intention to exclude "that implied warranty, it ought to be expressed in plain "language.*"

The defect in the Caledonia was a latent defect in her shaft, and the words of the bills of lading in that and this case are here set side by side.

CALEDONIA.

"The act of God, the Queen's enemies, pirates, restraint of princes and rulers, perils of the seas, rivers, navigation and land transit, of whatever nature or kind, restrictions at port of discharge, loss or damage from delays, collision, straining, explosion, heat, fire, *steam boilers and machinery or defects therein*, negligence, default or error in judgment of pilots, master, mariners, engineers, stevedores or any other person in the employ of the steamship, or of the owners or their agents *excepted*."

CARIB PRINCE (fol. 430).

"The act of God, the Queen's enemies, pirates, robbers, restraints of princes, rulers and people, loss or damage from heat or fire, on board, in hulk or craft or on shore, explosion, steam, *accidents to or latent defects in hull*, tackle, boilers and machinery, or their appurtenances, jettison, barratry, any act, neglect or default whatsoever of pilots, masters or crew in the management or navigation of the ship, quarantine, collision, stranding and all and every other dangers and accidents of the seas, rivers or steam navigation of whatsoever nature or kind always *excepted*."

In the District Court claimants' counsel contended that the addition of the *limiting* word "latent" to the C. P. bill of lading distinguished it from the Caledonia and made the latter case inapplicable. The force of this reasoning is that while the greater includes the less, the less is no part of the greater. If the *latent* defect in the shaft of the Caledonia was not a "defect," because it was latent, such argument might prevail.

In the Caledonia Judge Fuller further said "moreover the "words 'delays, steam boilers and machinery or defects "'therein' formed a part of a long enumeration of the causes "of damage *all the rest of which related to matters subsequent* "*to the beginning of the voyage*, and, by another familiar rule "of construction, they should be treated as equally limited in "their scope." * * "We are not dealing with the question "of how far exceptions may be given effect in particular cases, "but whether by those under consideration, claimants were "exempted from liability for unseaworthiness *and we are* "*clearly of opinion that they were not.*"

But the defect in this rivet-hole **was not latent.** It was patent to the man that put the rivet in, who had to use the drift-pin to get it in on an angle, and would be equally patent to every one who took the trouble *to examine the* **hole.**

If the iron of the rivet was bad, that could have been discovered by testing and no test was made.

If the theory (in support of which there is absolutely no proof) that it became crystallized by hammering, is accepted, then the too great hammering ought to have been avoided and prevented.

The Warranty of Seaworthiness.

In the **Hadji,** 20 F. R., 878, Wallace, *J.*, said: "It is the "*first* duty of a common carrier by water, to provide a vessel "tight, staunch and fit for the employment for which he holds "it out to the public."

"*The breach of this duty is the* **personal** *default of the* "*shipowner.*"

In **Bowring vs. Thebaud,** 56 F. R., 524, Wallace, *J.*, said: "The warranty that the vessel is tight and fit for the "employment for which she is offered, that is for the contem-"plated voyage on which she is to carry cargo, *is the very* "*foundation and substratum of the contract of carriage.*"

This "warranty of seaworthiness" implied by law in the contract of carriage is equally implied in the contract of insurance, and in the latter is the *condition precedent* to the insurance taking effect.

Maclachlan Mcht. Shpg., 418, "As the strictness "looked for in fulfilling a warranty is required here, his care "should carry him *as far as the carrier's contract requires him* "*to go, and further than that,* even to the letter of the, law in "its exactions under the insurer's contract."

The Quebec M. I. Co. *vs.* The Com. Bk. L. R., 3 P. C., 243, Lord Penzance: "It would seem, therefore, an odd conclusion "to come to, to say that * * the Underwriters * * should "have intended to surrender the warranty of seaworthiness "*which, after all, is the main protection to their interests.*"

2 Arnould M. Ins., 649 (6 ed.): "There is nothing in the law of "marine insurance more important to commerce and the preser-"vation of human life than this warranty" (of seaworthiness).

It follows that if the carrier may by contract relieve himself from the warranty of seaworthiness and have the right to

substitute for a seaworthy vessel, one that he believes to be seaworthy, or has used diligence to make seaworthy, but which in fact is not seaworthy, the shipper can obtain no insurance for his goods, and the anomaly in the law exists that it requires the insurer to provide a seaworthy vessel, and allows the carrier to furnish one that is not so.

This is pointed out in the opinion of Mr. Justice Fuller in the **Caledonia** (11 March, 1895), where he quotes from the decision in the Eugene Vesta, 28 F. R., 762, by Mr. Justice Brown as follows:

"*The theory of the law is that the implied warranty of "seaworthiness, shall protect the owner of the cargo until his "policy of insurance commences to run.*"

And Judge Fuller also quotes the words of Field, *J.*, in Cohn *vs.* Davidson, 2 Q. B. D., 455, who said: "No degree of sea- "worthiness for the voyage, at any time anterior to the com- "mencement of the risk, will be of any avail to the assured "unless the seaworthiness existed at the time of sailing from "the port of loading. *As therefore the merchant*, in a case "like the present, *would not be entitled to recover against his "underwriter by reason of the breach of the warranty in sail- "ing in an unseaworthy ship*, it would follow that, if the "warranty to be implied on the part of the ship-owner is to be "exhausted, by his having the ship seaworthy at an anterior "period *the merchant would lose that complete indemnity, by "means of the two contracts taken together, which it is the "universal habit and practice of mercantile men, to endeavor "to procure.*"

When it is further considered that the reason of the implied warranty is "that it takes away all temptation to expose "life and property to the dangers of the seas in vessels not fit "to encounter them" (per Curtis, *J.*, in Bullard *vs.* Roger W. Ins. Co, 1 Curt., 155) and that "every relaxation of the com- "mon law in relation to the duties and responsibilities of the "owners of carrier ships *is founded in bad policy* and detri- "mental to the general interests of commerce" (per Story, *J.*, in the Sch. Reeside, 2 Sum., 575), or as it is put by Freedman, *J.*, in Rogers *vs.* Sun. Mu. Ins. Co., 46 Supr. Crt., 65: "The rule "of seaworthiness may in some instances act as a harsh one, *but*

"*it is a reasonable and salutary one, and public policy is* "against *its relaxation in favor of the owner because upon its* "*enforcement depends in a great degree the safety of the crew* "*and passengers*;" it is evident that the law, which has imposed this warranty on the business of carriage by sea, will not permit it to be frittered away by subtleties and nice distinctions; and it would not be going too far to say that it is *incompetent* for the ship-owner to relieve himself from it at all.

Such was the conclusion reached in 1838 by Cowen, *J.*, in Cole *vs.* Goodwin (19 Wend., 251), where, at p. 281, he says: "Admit- "ting that the plaintiff *acceded* in the clearest manner to the "proposition in the notice that his baggage should be carried "on the terms mentioned, *I think the contract thus made was* "*void on his part as contrary to the plainest principles of pub-* "*lic policy.*"

In Gould *vs.* Hill (1842), 2 Hill, 633, Judge Cowen followed this dictum by a direct decision in which he cited and followed Judge Story in the Reeside, above quoted from.

It is to be noted that Judge Nelson dissented, and in N. J. St. Nav. Co., *vs.* Mech. Bk., 6 How., 382, in 1847, he gave his reasons: "*As the extraordinary duties annexed to his em-* "*ployment concern only in the particular instance the parties* "*to the transaction, involving simple rights of property*, the "safe custody and delivery of the goods, we are unable to per- "ceive any well founded objection to the restriction, *or any* "*stronger reason forbidding it than exists in the case of any* "*other insurer of goods*—to which his obligation is analogous, "and which depends altogether upon the contract between the "parties."

It is submitted that the above remarks are *obiter* as to the present question, and the reasons given are unfortunate and inapplicable. There is no *duty* on an underwriter to insure, and he may refuse to contract, or limit his insurance as he pleases; but the carrier cannot legally refuse to carry, and the question is, *may he contract to carry at the shipper's risk in an unseaworthy vessel?*

This distinction is pointed out by Bronson, *J*, in Wells *vs.* Nav. Co., 2 N. Y., 209, where he said: "It is, perhaps, a "debatable question whether common carriers and inn keepers "*can contract* for a more restricted liability than the law

"imposes upon them in the absence of a special agreement. "But there is no room for doubt that other bailees and persons "engaged in other employments may contract for either a "larger or a more restricted liability than would be implied "against them in the absence of a special contract. *They are "not like common carriers bound to accept employment when "offered, nor like them, tied down to a reasonable reward for "their services.* They are at liberty to demand an unrea- "sonable price before they will undertake any work or trust, or "to reject employment altogether, and they may make just "such stipulations as they please concerning the risk to be "incurred."

The Laertes, 12 P. D., 187. There were three bills of lading containing different wording, viz.:

1. Warranted seaworthy only so far as *ordinary* care can provide.
2. Warranted seaworthy only as far as *due* care in the appointment or selection of agents, superintendents, pilots, masters, officers, engineers and crew can ensure it.
3. Owners not to be liable for loss, if arising from *latent* defects in boilers, machinery, **even existing at time of shipment** (note the words).

The vessel became unseaworthy by a latent defect in her flywheel and was towed by another vessel belonging to the same owners, and her cargo libelled for salvage.

Butt, *J.* (188), said: "The flaw in the shafting which led to "the breakdown *existed when the ship started*, and therefore "she was not seaworthy for the voyage. If the implied war- "ranty existed or was not limited by the contract in the bill of "lading, then the owners of the Laertes, being also the owners "of the Achilles, could not sue as salvors."

Overruling the contention that the bills of lading did not limit the warranty of seaworthiness, Judge Butt said: "I think "the exception (above set out) in the third bill of lading, *if it "does not abrogate, at all events limits, the warranty which "the law would otherwise imply, that the ship was seaworthy "at the beginning of the voyage.*"

And thereupon the Court awarded £1,200 salvage against this cargo *and gave £900 of it to the owner of the unseaworthy ship.*

But one step further is necessary and that is to allow the

warranty to be absolutely abrogated by contract and allow the carrier who knows that his vessel is unseaworthy to recover salvage, and then he will prepare in advance to earn it by sending out the rescuer with the doomed vessel.

The Harter Act.

Ch. 105, Acts of 1893, p. 445.

The claimant does not specifically plead this act but alleges *due diligence* to make the vessel seaworthy (13) and in the District Court his counsel claimed its benefit.

The charter party contracts for a vessel tight, staunch and strong and this has been held to mean an absolute warranty that she is so and not that the owner will use due diligence to make her so.

The E. I. Morrison, 153 U. S., 199.
The Caledonia, 156 U. S.

If under the Harter Act the shipowner is permitted to escape liability when he has used due diligence, there is certainly nothing to prevent him contracting that his vessel is and shall be seaworthy, and not merely that he will try and make her so. In other words he may by contract agree to waive all benefit of any exemptions the law would give him.

Does the Harter Act apply?

This English vessel claims to be protected by an act of Congress which by § 5 imposes a penalty of $2,000 "for a violation " of any of the provisions of this act."

And by § 1 forbids the insertion of clauses in any bill of lading whereby negligence is excepted, which exception is valid by the law of England.

This is obviously *domestic* legislation, yet in the Etona, 64 F. R., 882, Judge Brown held it applied to foreign vessels, saying: "Under the explicit language of the third section of the " act of February 13, 1893, which extends its provisions to 'any " 'vessel transporting merchandise or property to or from any " 'port in the United States,' I do not feel authorized to limit " its application to vessels of the United States alone."

The Construction to be Given.

The Main vs. Williams, 152 U. S., 132. "The English "courts have held, *very properly we think*, that these statutes "should be strictly construed. As observed by Abbott, "*C. J.*, in Gale *vs.* Laurie, 5 B. & C., 156, 164: 'Their "'effect, however, is to take away or abridge the right of "'recovering damages, enjoyed by the subjects of this country "'at the common law, and *there is nothing to require a con-*"'*struction more favorable to the ship-owner than the plain* "'*meaning of the word imports.*' To the same effect are the "remarks of Sir Robert Phillimore in The Andalusia, 3 P. D., "182, 190, and in The Northumbria, L. R. 3 Ad & Ec., 6, 13. "Speaking of this statute, Lord Justice Brett, in Chapman *vs.* "Royal Netherlands Nav. Co., 4 P. D., 157, 184, remarked: "'A statute for the purposes of public policy, *derogating, to the* "'*extent of injustice*, from the legal rights of individual parties, "'should be so construed as to do the least possible injustice. "'This statute, whenever applied, must derogate from the direct "'right of the ship owner against the other ship-owner. * * * "'It should be so construed as to derogate as little as is possible, "'consistently with its phraseology, from the otherwise legal "'rights of the parties.'

"While, from the universal habit of insuring vessels, the "application of the statute probably results but rarely in an "actual injustice to the owner of the injured vessel, yet, being "in derogation of the common law, we think the court should "not limit the right of the injured party to a recovery beyond "what is necessary to effectuate the purposes of Congress."

It would seem reasonable, that if Congress intended to radically change the common law, which had its source in the public policy declared by courts to be the basis of the common carriers responsibility, it should do so in unmistakable language; and that before a court should be required to abandon rules which have been declared to be of such high import in commercial dealings *and matters of paramount public interest*, they should have the instructions to do so in terms of no doubtful meaning.

§ **3** of the Harter act provides:

"That if the owner of any vessel transporting merchandise or "property to or from any port in the U. S. of Am. shall exer-

" cise *due diligence* to make the said vessel in all respects sea-
" worthy and properly manned, equipped and supplied, neither
" the vessel, her owners, agent or charterer shall be held responsi-
" ble for damage or loss **resulting** *from faults or errors of*
" *navigation or in the management of said vessel.* * *

Note.—The above language must be carefully considered. There is not one word in it, which, by any construction can be said to diminish the obligation to furnish a seaworthy vessel. Certain damages are specified, *resulting* not from unseaworthiness but from faulty navigation or management, from which the owners are conditionally absolved ; but, it is a familiar rule that if the accident would not have happened to a seaworthy vessel the owner is still liable even if he has excepted the cause of damage.

If therefore the Carib Prince's bulkhead gave way from two concurrent causes, one its bad construction and the other the alleged bad management in filling it at sea, the statute will not avail the claimant.

"Nor shall the vessel, her owner or owners, charterers, agent
" or *master* be held liable for losses arising from dangers of the
" sea or other navigable waters, acts of God or public enemies,
" or the inherent defect, quality or vice of the *thing carried* * *

Note.—The vice of the ship is not mentioned.

" or from insufficiency of package or seizure under legal process,
" or loss resulting from any act or omission of the shipper, or
" owner of the goods, his agent or representative, or from
" saving or attempting to save life or property at sea, or from
" any deviation in rendering such service."

All the above enumerations of exemptions, is dependent on the conditional "if," and the careful reader of the section will see that no definition of the "due diligence" required, as the operative condition is given.

What is Due Diligence?

"There are infinite shades of care or diligence from the
" slightest momentary thought or transient glance of attention
" to the most vigilant anxiety and solicitude."

Story on Bail, § 11.

§ 3 of the act is not the only one in which the words "due diligence" are used, for in § 2 is the prohibition "to insert in "any bill of lading any covenant whereby the **obligations** "of the owner to exercise **due diligence** (*sic*) properly equip, "man, provision *and* outfit said vessel *and* to make said vessel "seaworthy * * **shall in any wise be lessened, "weakened or avoided.**"

> *Note.*—When Congress here used the word "obligations" it did not define them, but referred to the well known and fixed duties, and when it declared that such *obligations* should not by any covenant be *lessened, weakened or avoided*, it gave full effect to the *existing recognized obligations.*

But the existing obligation of the ship-owner was to furnish an absolutely seaworthy vessel, and if it was not to be weakened, the sentence quoted from Art. 2 should be divided into two heads:

(1.) The obligation of the owner to exercise *due diligence* to properly equip, man, provision and outfit said vessel.
(2.) The obligation to make said vessel seaworthy.

This distinction has been recognized by the courts.

They say the warranty of seaworthiness is *absolute*, and they also say that the duty to carefully stow cargo is limited to *due* diligence.

Lawrence vs. **Minturn,** 17 How., 115. Curtis, *J.*: "The master is bound to use *due diligence and skill in stow-* "*ing and staying the cargo*, but there is no absolute warranty "that what is done shall prove sufficient."

The grammatical construction of § 2 bears out the above contention. The conjunction, "*and*" is used twice in the sentence, "whereby the obligations" (*note the plural*) "of the owner or "owners of said vessel to exercise due diligence, properly "equip, man, provision *and* outfit said vessel, *and* to make said "vessel seaworthy."

The substantive "*obligations*" is governed by the verbs "*to exercise*" and "*to make*," coupled by the second "and" while the first "and" connecting the words "provision" and "outfit" make them relate back to the "*due diligence.*" The use of the word "properly" also confirms this; it qualifies the

"*due diligence*" and explains that it applies to each of the items, equip, man, provision, outfit; but it has no application to the "*make said vessel seaworthy*," which is left, as before, an absolute obligation.*

Full force must be given to the words, "*in anywise be lessened, weakened or avoided*" in § 2.

It is plain that Congress was dealing with a well defined *obligation*, and one whose degree of binding force it declared should not be "lessened, weakened or avoided" and this could only be done by keeping it exactly as it then existed.

If the words "*due diligence*" be taken to apply to seaworthiness, they must be interpreted, in order not to lessen or weaken the obligation, to mean that the same degree of responsibility for seaworthiness still attaches to the carrier as before the act was passed.

The Obligations of Common Carriers.

Liverpool Steam Co. vs. Phenix Ins. Co., 129 U. S., 440, Gray, *J.*, reviewed *Railroad Co.* vs. *Lockwood*, 17 Wall. 357, and analyzed its conclusions, as follows:

> "The employment of a common carrier is a public one, "charging him with the *duty* of accommodating the pub- "lic in the line of his employment. A common carrier is "such by virtue of his occupation, not by virtue of the re- "sponsibilities under which he rests. Even if the extent "of these responsibilities *is restricted by law* or by con- "tract, the nature of his contract makes him a common "carrier still. * * * * The fundamental *principle* upon "which the law of common carriers was established, was "to secure the *utmost* care and diligence in the perform- "ance of their duties. *That end was effected, in regard "to goods, by charging the common carrier as an insurer*, "and in regard to passengers, by exacting the *highest* de- "gree of carefulness and diligence. A carrier who stipu- "lates not to be bound to the exercise of care and dili- "gence, seeks to put off the *essential duties* of his employ- "ment. * * * * The law demands of the carrier careful-

* The "properly" in § 3 is immediately followed by "manned," showing that it was intended to qualify each of the three words—expressed in different order in § 2.

"ness and diligence in performing the service; *not merely* "*an abstract carefulness and diligence in proprietors and* "*stockholders who take no active part in the business.* To "admit such a distinction in the law of common carriers, "as the business is now carried on, would be subversive of "the very object of the law."*

"The carrier and his customer do not stand upon a foot- "ing of equality. The individual customer has no real "freedom of choice. He cannot afford to higgle or stand out, "and seek redress in the courts. He prefers rather to ac- "cept any bill of lading, or to sign any papers that the "carrier presents; and in most cases he has no alternative "but to do this or to abandon his business. * * * * "*It being against the policy of the law* to allow stipula- "tions which *will relieve the railroad company from the* "*exercise of care or diligence*, or which, in other words, "will excuse it for negligence in the performance of its duty, "the company remains liable for such negligence."

"This analysis of the opinion in Railroad Co. *v.* Lock- "wood shows that it affirms and rests upon the doctrine "that an *express* stipulation by ANY common carrier for "hire, in a contract of carriage, that he shall be exempt "from liability or losses caused by the negligence of himself "or his servants is unreasonable and *contrary to public* "*policy* and consequently void."

Note that the Court says that "*the fundamental principle* "upon which the law of common carriers was established was "*to secure the utmost care and diligence* in the performance of "their duties." This was a declaration of a purpose. Then followed this language: "That end was effected, in regard to "goods, by charging the common carrier *as an insurer*, and, in "regard to passengers, by exacting the *highest* degree of care- "fulnesss and diligence."

What is "due diligence," in its application to the duty of a carrier to make his vessel seaworthy?

Is it to be held to be something less than the obligation, as

* Note Judge Wallace's expression in The Hadji, 20 F. R., 878, where he says "The breach of this duty is the *personal* default of the shipowner."

insurer, which, as quoted from the case cited above, is based upon a "*fundamental principle*" and "was to secure the utmost care and diligence in the performance of their duties." As already shown by that case, the "*fundamental principle*" was worked out by charging the common carrier of goods, as insurer, and the carrier of passengers was held to the *highest* degree of carefulness and diligence.

In Penn. Co. vs. Roy, 102 U. S., 455,

the Court was dealing with a carrier of passengers, and Judge Harlan said:

> "Those thus engaged are under an obligation arising out "of the nature of their employment, *and on grounds of* "*public policy*, vigorously enforced, to provide for the "safety of passengers whom they have assumed, for hire, "to carry from one place to another."

And again at page 456 he said:

> "He is responsible for injuries received by passengers in "the course of their transportation which might have been "avoided or guarded against by the exercise upon his part "of *extraordinary vigilance aided by the highest skill*, "and this caution and vigilance must necessarily be ex- "tended to all the agencies or means employed by the "carrier in the transportation of his passengers. Among "the duties resting upon him is the important one of "providing cars or vehicles adequate, that is, sufficiently "secure as to strength and other requisites, for the safe "conveyance of passengers. *That duty the law enforces* "*with great strictness;* for the *slightest negligence* or fault "in this regard from which injury results to the passenger "the carrier is liable in damages. These doctrines to which "the courts with few exceptions have given a firm and "steady support, and which *it is neither wise nor just to* "*disturb or question*, would, however, lose much, if not "all, of their practical value, if carriers are permitted to "escape responsibility upon the ground that the cars or "vehicles used by them, and from whose insufficiency in- "jury has resulted to passengers, belong to others."

In Robinson vs. the N. Y. & Cent. R. R. Co., 8 F. R., 877, Judge Wallace had before him the liability of the com-

mon carrier to his passenger, who had been injured by an explosion of the defendant's locomotive and was reviewing the instructions to the jury. He said :

> "They were also instructed that it was incumbent upon
> " the defendant as a passenger carrier to see to it, by *every*
> " test recognized as necessary by experts, that the boiler
> " was in safe condition, but that they were not liable for a
> " defect which *could not be discovered* by such test," and
> he said that this instruction was strictly correct. "It has
> " been frequently declared that the carrier of *passengers*
> " contracts for their safety, as far as human care and fore-
> " sight can go, and *must* adopt **all** the precautions which
> " have been practically tested and are known to be of value
> " and employ all the skill which is possessed by men whose
> " services it is practicable for the carrier to procure. But
> " the instruction was, that the defendant was not exculpa-
> " ted if the defect *could have been discovered* by the appli-
> " cation of **all** tests recognized by the experts as necessary.
> " It surely would not express the true extent of the carrier's
> " liability to say that the carrier is exonerated if the defects
> " could not be discovered by the application of *some* of the
> " tests which experts recognize as necessary. If there was
> " *any* test recognized as necessary, which was not applied,
> " the carrier failed to comply with its obligations."

Apply the above doctrine to the present case, *assuming that the carrier has ceased to be an insurer*, and has become responsible only for *due diligence*, and what answer can the ship-owner make for his failure to apply the test of filling the tank after the hurricane of August 20th, and for his failure to apply the test of tapping the rivets with a hammer or seeing that the limbers were sufficiently open to let the water reach the bilges.

Why, if the collision bulkhead is required to protect the steamer against the peril of water entering the forepeak, in case of collision, which may happen in rough weather, as well as in smooth ; why, I say, should not the strength of that bulkhead be sufficient to stand all strains resulting from partly filling the tank, and why is it not the owner's duty to ascertain that it is strong enough to resist that necessary amount of surging of the water, which must be anticipated, while it is partly filled, after a collision. It is obvious that the tank might not be filled after

a collision, to its full extent, and therefore must be expected to stand the strain of the surge of the water.

Again, this surging of the water in the tank is such an obvious danger, that common prudence would require it to be guarded against. This could be done by the division of the water into small bodies, or by breaking the force of the surge by plates or beams so placed as to act as "breakwaters." If the tank, by reason of its size and the weight of 83 tons of water in it, was exposed to too much force of the surge, the easy remedy was subdivision. The ship-owner took all responsibility for these details and cannot throw off that burden on the innocent cargo-owner.

For the reasons above set forth the decrees should be reversed and the causes remanded to the District Court with instructions to ascertain the amount of the several libellants damages, and enter decrees therefor with costs.

Dated April 5th, 1895.

Respectfully submitted,

GEO. A. BLACK,
Proc. Liblt.